

**Chapter 521: *Applications for Waste Discharge Licenses, Amendment
Pertaining to Post-Construction Storm Water Discharges in Urban
Impaired Stream Watersheds***

Basis Statement & Response to Comments

February 10, 2010

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Basis Statement

Chapter 521 pertains to applications for waste discharge licenses. Section 9 of the rule pertains to storm water discharges. This proposed rule amendment would create a new section, 9-A, which would apply to an owner or operator of property in an urban impaired stream watershed that has been designated by the U.S. Environmental Protection Agency (EPA) pursuant to the Clean Water Act, 33 U.S.C. §§1251 et seq., and 40 C.F.R. §122.26 (a)(9)(i)(D), or the Department pursuant to Chapter 521(9)(a)(1)(v) as requiring a storm water discharge permit due to post-construction stormwater flow from impervious area.

On October 28, 2009 the EPA issued a final designation decision pertaining to post-construction storm water discharges in the Long Creek watershed in South Portland, Westbrook, Portland and Scarborough. Long Creek is the only stream currently so designated in Maine. On November 6, 2009, The Department issued a general permit pertaining to post-construction storm water discharges in the Long Creek watershed. The general permit provides coverage to an operator with a designated discharge, who agrees to participate in the implementation of the Long Creek Watershed Management Plan. The proposed amendment to Chapter 521 provides standards for someone seeking an individual permit instead of coverage under the general permit. It would also apply to other urban impaired stream watersheds, of which there are currently 31 listed, if post-construction storm water discharges in those watersheds should become designated in the future.

The proposed standards in Chapter 521 would require an operator of a designated storm water discharge to meet the general standards in the Maine Stormwater Management Rules, 06-096 CMR 500. The standards also require annual inspections, and development and adherence to a maintenance plan and an on-going water quality monitoring program for the discharge property. In addition, the Department may require an operator to take measures to mitigate the impact of past storm water discharges on the stream, or contribute to stream restoration work through an approved watershed management plan.

Comments were received from the Maine Turnpike Authority (MTA) and the Maine Department of Transportation (MaineDOT).

MTA expressed concern that the proposed standards in Chapter 521 are stricter than the standards in Chapter 500 in that the Department has proposed to not include an allowance for reduced treatment (75% treatment instead of 95% treatment) from linear projects; i.e., from roads. MTA asked that this provision be included in Chapter 521, along with provisions contained in a Memorandum of Agreement (MOA) dated November 14, 2007 that the Department has entered into with both MTA and MaineDOT in lieu of requiring individual permits under the Maine Storm Water Law. The MOA provides for the agencies to provide a more holistic approach to stormwater management by providing a base level of erosion and sedimentation control for all projects and not just those that trigger the Maine Storm Water Management Law. MTA's reasoning for including these measures is that they were originally developed to apply to new development projects to ease the financial burden for these agencies to comply with the stormwater standards. In the case of retrofitting an existing road with stormwater treatment measures, it is even more difficult technically to do and more expensive. MaineDOT supports these comments.

The Department has not proposed adopting the reduced treatment from linear projects standard, nor the provisions of the MOA, because roads are a significant contributor of pollutants in stormwater runoff. Allowing the reduction of treatment from these sources would be unfair to private landowners who are not given a similar reduction for their non-linear, developed areas. While the Department acknowledges that meeting the full treatment standard would be difficult, the general permit provides a less costly alternative in the only watershed to be designated to date. The Department anticipates that general permits would be offered in other watersheds should they become designated in the future. By utilizing the general permit option, both MTA and MaineDOT would clearly be on equal footing with private entities that are also regulated based on the amount of impervious area they have in the watershed. The Department also finds that the MOA is not appropriate to apply to a designated watershed that needs to be restored. Measures to provide for treatment of stormwater runoff from existing developed areas is what is needed to restore an urban impaired stream. Such measures are not required under the existing MOA.

The Response to Comments section that follows, lists other requested changes, including the following that the Department is proposing to make to the draft rule:

1. Add a provision for allowing off-site treatment of stormwater in the same watershed, if on-site treatment is impracticable, in sub-section (a)(2).
2. Modify sub-section (b) to include language that the impact of a stream must be due to storm water flow from impervious area that includes the applicant's area of operation in order to ensure that the requirement not be made if there is no impact from the applicant's site.
3. Modify sub-section (b)(1) so that the level of mitigation required will be in proportion to the estimated discharge from the applicant's property in relation to the amount of contributing discharge from other properties.
4. Modify sub-section (b)(2) so that any financial contribution required for stream restoration be based on the amount of impact caused by the applicant's past

discharges where this can be assessed, and to require that payments made toward implementation of a watershed management plan be utilized for specific mitigation work identified in the watershed plan.

MTA requested the Department to consider and more fully describe all fiscal impacts in the Long Creek watershed and statewide. The Department has added additional language regarding the estimated fiscal impact to the Fact Sheet.

MTA also asked the Department to consider whether it is more proper to treat this rulemaking as major substantive rather than routine technical due to the potential fiscal impact of the rule. The Department does not propose to ask for a change in status of the rule from routine technical to major substantive. The cost of restoration of a stream is expensive, but is the necessary outcome of the federal designation, which, in the case of Long Creek, was made by the U.S. EPA. The proposed rule outlines measures that are expected to be much more costly than the general permit that the Department has previously issued. There are no existing federal regulations governing how to restore an impaired stream, but the Department's assessment is that the watershed plan that was developed for Long Creek with landowner participation is the most cost effective option available.

MaineDOT concurs with the comments from MTA. MaineDOT indicates that it plans to file for a general permit in the Long Creek watershed, but is concerned about logistics for complying with the provisions of the Participating Landowner Agreement. MaineDOT is also concerned about how the rule may be applied in the other 30 urban impaired stream watersheds should they become designated and has asked the Department to continue discussions with both MTA and MaineDOT on development of an alternate general permit for linear transportation facilities. The Department is willing to explore options for an alternate general permit, but remains concerned about ensuring equity between all regulated dischargers in a designated watershed.

Response to Comments

Comments were received from Jonathan Arey on behalf of the Maine Turnpike Authority (MTA) and from Judy Gates on behalf of the Maine Department of Transportation (MaineDOT).

Comments from Maine Turnpike Authority (MTA)

Comment: I. Introduction

The Maine Turnpike Authority has worked collaboratively in the Long Creek process since the beginning, over two years prior to Long Creek's formal RDA designation. Our goal has been to help produce a Watershed Management Plan and General Permit that we felt would be effective and fair. At the same time, the MTA has always had concerns, which we have expressed to DEP staff and the Long Creek working groups, with the General Permit concept. These concerns relate mainly to the fact that the General Permit removes the MTA, a state authority, from the jurisdiction of the DEP and places it under the jurisdiction of a locally governed board and District. Furthermore, it is possible that within the next several years the Maine Turnpike may need to be widened through the Long Creek watershed at which point, for engineering reasons, it may make more sense for the MTA to obtain an individual permit than a general permit. While we believe the Long Creek General Permit is on the whole a fair and workable solution that addresses needs of the majority of participants we believe that in our capacity as a state entity, and the possibility of major reconstruction in our future, it may or may not be workable for us. Therefore, we have always felt it important that the Individual Permit be a fair and workable alternative to the General Permit option.

Throughout the development of the Long Creek General Permit the MTA, like the other participating stakeholders, have been told that the individual permit would be a viable alternative to the General Permit, yet we did not specifically know what the individual permit would contain until this month. Now that we have seen the proposed individual permit, we believe the basic framework is appropriate. However, there are provisions within the individual permit which single out transportation agencies for detrimental treatment and which we believe mean that the individual permit, at least not for the MTA is not the true alternative it has been described as in the MaineDEP Rule-making Fact Sheet. We also noted some more general issues of equity, which we believe would be of concern to any potential applicant attempting to decide between the general and individual permit options. These issues are described in the comments below and summarized in Section VIII. The MTA would be happy to expand upon these comments or answer any questions on these comments that DEP Staff or the Board of Environmental Protection may have.

Response: *Restoring water quality in a water resource that has been impacted due to urban development typically requires retrofitting sites with water treatment systems, which often is difficult and expensive. The Long Creek General Permit was created as a less expensive alternative to requiring each site in the watershed to treat all of its own stormwater. Under the permit, resources are pooled and used to carry out stormwater*

mitigation projects that a technical committee has deemed to be the most cost effective treatment measures. An entity that is subject to regulation can choose to participate in the general permit by signing a Participating Landowner Agreement, thereby voluntarily choosing to team up with other regulated entities to carry out the work. The Department expects that participation under the general permit will be much less expensive for most regulated entities when compared to the individual permit that would have to meet the standards in Chapter 521.

An entity choosing to file for an individual permit, will likely need to have stormwater treatment measures established on its property that meet the State's current stormwater standards in Chapter 500 in order for this approach to be cost effective. The individual permit requirements in Chapter 521 do not allow the same allowances for linear projects, such as roads, as are currently provided for in Chapter 500. The reason for this is to increase the likelihood of restoring the water quality of the impaired stream by treating significant sources of stormwater and to keep the requirements equitable when comparing the requirements of private entities with those of the public sector. The individual permit requirements do not single out transportation agencies for detrimental treatment, as claimed, but rather treat all designated dischargers equally.

Comment: II. Transportation Agencies and Chapter 500

DEP has chosen Chapter 500 of its storm water rules as the IP's (Individual Permit's) benchmark requirement. This is appropriate because Chapter 500 is the most comprehensive statewide standard on storm water management and control. However, Chapter 500 is primarily a construction standard, so to impose it retroactively as a post construction standard inevitably raises difficulties. A primary difficulty is that, once a site is constructed to the existing pre-Chapter 500 standards, it can be difficult to retrofit that site to meet standards it was not originally designed for. This is especially true for sites that have limited property to work with to meet the structural requirements of Chapter 500. Highways, in particular, which are designed to have a very limited right of way on either side of the pavement, and often are subject to federal safety guidelines which limit what can be done on that right of way, have intrinsic difficulty meeting a Chapter 500 standard that was primarily designed for traditional development, such as a parcel with a building and parking spaces which can be relatively freely configured compared to the linear constraints of a roadway. This difficulty applies even for new construction and that fact has long been recognized by the Legislature and the DEP through modifications to the way in which the MTA and MaineDOT meet Chapter 500 Standards. These modifications include a volumetric reduction in the treatment required for linear projects in Chapter 500 itself (hereafter referred to as "the 75% treatment standard") and the Stormwater Memorandum of Agreement which are discussed further below. The draft rule as written is extremely onerous, and possibly impossible, for the MTA to comply with because not only does it require us to retrofit an existing highway to standards it was not designed for, but it removes the modifications which the legislature and DEP have always believed necessary in the past for even a newly constructed highway to meet those standards.

Response: *The Department recognizes that it is difficult to treat runoff from a linear project such as a road because of the very limited area controlled by the operator. However, the Department also recognizes that roads are significant sources of stormwater runoff that needs to be treated in order to restore an urban impaired stream such as Long Creek. To lessen the burden for road agencies as compared to other operators in the watershed would result in shifting the burden to those other operators, which would be unfair to them. For this reason, the Department expects public transportation agencies will find the general permit to be the most cost effective option available.*

Comment: II(A). The 75% Treatment Standard

Section 4(B)(3)(c) of Chapter 500 includes a provision that for “Linear Portions of a Project” 75% treatment of stormwater is allowed to meet the Chapter 500 “General Standards.” The DEP did not adopt this provision in Chapter 500 because it believed that treatment of storm water from roadways was not as important as treatment of runoff from other types of property. This provision is, instead, a recognition of the reality that the limited right of way of roadways has always made implementation of the traditional BMPs allowed under Chapter 500, which are all real estate intensive, difficult to apply.

This rationale underlying the 75% Treatment Standard has been acknowledged in conversations with DEP staff. DEP staff has also stated that the decision behind the proposal to remove this Standard was made in part due to a belief that other landowners in the Long Creek District or future designated districts might otherwise feel that this provision gave transportation agencies unfair “special treatment.” There may be some landowners who would feel that way about this provision, but we do not believe that is a valid rationale for discarding it. Different types of development are often treated differently for technical and public policy reasons under the law. There are sound technical and public policy reasons behind the 75% Treatment Standard and those rationales apply in the urban impaired stream watersheds, and specifically the Long Creek RDA, context just as much as they ever have.

In fact, the 75% Treatment Standard is even *more* appropriate in a post construction context because the highway’s right of way is already established and may be impossible to modify without hardship to abutters. Treating 100% of the runoff volume might be difficult in a new highway, but planning and right of way acquisition can take this into account, a highway might be realigned or redesigned and, in an extreme scenario a decision made not to build the highway project at all. For an existing highway segment, there may well be no way of obtaining the right of way necessary to treat 100% of the highway’s runoff without completely rebuilding the highway, acquiring property of neighbors, or both. This is exacerbated further when the area described is an area as intensely developed as the Long Creek Watershed.¹ To take a standard always thought

¹ The MTA does have the power of eminent domain and therefore could conceivably condemn adjoining property in order to obtain property for BMPs. This is something that the MTA as an agency would be extremely loath to do and would take every step to avoid. Beyond the obvious financial and political issues this would raise, it would not be beneficial to the watershed as a whole because, especially in the Long Creek area where undeveloped property is scarce, any property condemned by the MTA would

necessary for new road construction and remove it in a situation where that standard can only be more sorely needed; especially if this is being done, at least in part, for the purpose of making the permit more palatable to other differently situated landowners, is not a sound basis for public policy.

Response: *The Department concurs with MTA's assessment of why a relaxation of the general standard was included in the Chapter 500 general standards for roads. As stated previously, the allowance was not carried into Chapter 521 because of the need to treat roads as stringently as other property that is subject to permit requirements. MTA's view that this is unfair to the transportation agencies because of the high cost of complying with the permit requirements might seem plausible if there were no other alternative available to them. However, the general permit remains a viable alternative that would be more cost effective.*

Comment: II(B). The Storm Water Management Memorandum of Agreement
Maine's state storm water management law, under which Chapter 500 was promulgated, shows that the legislature has recognized the difficulties which agencies in charge of roads could face in complying with storm water regulations. 38 MRSA 420-D provides regulatory relief for projects undertaken by the MTA and MaineDOT from the storm water management law and requires that the MTA, MaineDOT and DEP work collaboratively through development of an interagency agreement process, to develop a method whereby new road construction can come as close as possible to meeting the applicable storm water standard. That collaborative process resulted in a Storm water Management Memorandum of Agreement ("the Storm water MOA") between the DEP and the two transportation agencies. The MOA's main requirement is that the transportation agencies will work in concert with the DEP, in each particular situation, to develop a method whereby the state transportation agency will "achieve stormwater quality and quantity controls reasonably consistent" with Chapter 500 standards "to the extent practicable as determined through consultation with and agreement by DEP."² We want to emphasize that this is the method for dealing with new construction in Maine, including the watershed of an urban impaired stream, which is the category of stream that includes Long Creek. We believe this is an appropriate method, allowing the DEP to recognize the limitations of roadways as appropriate in varying environments, but still to tailor requirements to obtain the maximum practicable treatment in a particular context.

It is not clear to us whether the Storm water MOA is superseded by this proposed rule and we believe the time to clarify this question is within the rule making process. We

remove property that a neighboring property or the newly formed Long Creek Watershed Management District could be using for its treatment BMPs. We raise this issue to illustrate what we believe would be a basic unfairness in issuing a permit that was impossible for a public entity to comply with, without resorting to an eminent domain process which in the long run would probably be both counterproductive and on some level unfair.

² Memorandum of Agreement for Storm water Management Between the Maine Department of Transportation, Maine Turnpike Authority and Maine Department of Environmental Protection, dated November 14, 2007, Section 3(B)(1)

believe it is appropriate for the DEP to specifically retain this collaborative method of meeting Chapter 500 in this context for the same reasons we believe it is important to retain the 75% Treatment Standard. We believe retention of this standard is even more important in the case of the Storm water MOA, because state law has determined that this is the method by which it is appropriate for state transportation agencies to address storm water issues and deference should be shown to that fact, at least until a different indication is given by the legislature.³ We also do not believe that retention of the MOA will decrease the quality of whatever storm water control would be required under the permit. Specifically incorporating the Storm water MOA would allow the permit to become one under which it is at least possible to design a way for the MTA to comply, while still allowing the DEP to designate the most effective level of storm water control, treatment and mitigation it felt was appropriate within the existing limitations.

Response: *The Department recognizes that the legislature created the provision for a Memorandum of Agreement (MOA) for MTA and MaineDOT to enter into with the Department as an alternative to permit requirements under the Maine Storm Water Law. The Department does not have authority to waive permit requirements for designated discharges under the Maine Waste Discharge Law. Nor does it consider the Maine Storm Water Law approach to permitting for the state transportation agencies appropriate for restoring water quality in an urban impaired stream due to the need to treat all significant storm water sources, and to treat both private and public sector operators equitably in carrying out this task. The Department further recognizes that the MOA is subject to revision and that more stringent measures may be necessary for managing activities in impaired watersheds in the future. The MOA remains otherwise in effect and is not superceded by this rule.*

Comment: III. Stream Restoration Offsite Mitigation and Riparian Project Fees

Part (b-d) of the rule deals with mechanisms that require a landowner to go beyond preventive treatment of its own runoff and require contribution to a restorative effort of a stream deemed to have been contaminated by storm water runoff. The MTA agrees that inclusion of some form of restorative effort as a permit requirement is appropriate in circumstances where a stream has already been impaired. We furthermore agree that the nature of this effort means that DEP has to have some degree of discretion in enforcing this permit requirement. However, we believe that this rule as written contains a discretion that is so open ended as to be unfair to individual permittees, especially since, as written, the rule could be used to require those individual permittees to pay for mitigation of runoff for which they were in no way responsible.

³ We understand that the proposed rule is being promulgated under the state waste discharge law and delegated "post construction" NEPDES authority from the federal government under the Clean Water Act, whereas the specific legislative enactment of the MOA process is part of the state "pre construction" storm water management law. However, if it is appropriate to import an existing state standard, blessed by the legislature (Ch 500) into a NEPDES permit, as this proposed rule does and as we believe it is appropriate to do, then it is also appropriate to import the existing state method, equally blessed by this standard, for complying with that standard. This is especially true when the legislative intent in providing the MOA process was to recognize an inherent difficulty on the part of transportation agencies in pre construction contexts which is even greater in post construction contexts.

The individual permit has always been described as an alternative to the general permit approach. The concept of the general permit approach is that landowners contribute to a pool of money which is used to benefit all landowners in the watershed by doing collectively, through a central District, the treatment and restoration work that landowners are unable or unwilling to do on their own. Everyone contributes to the general good and receives some benefit or other from participation. Because the benefit received is hard to quantify, the contribution is only fairly roughly correlated to a landowner's actual contribution to the stream's impairment. Furthermore, landowners are not required to meet any particular standard of treatment or mitigation on their own properties, so long as they contribute their share to the general fund, which may go to treat the landowner's runoff or the runoff of another landowner according to priorities established by the governing District. By contrast, under the individual permit landowners are expected to address their own runoff through treatment and other measures, which will sometimes be extensive and expensive. Therefore, while it may be fair to require these landowners to provide mitigation for damage their own runoff has produced, even if that damage is "offsite", it is unfair, as it might not be under a General Permit regime, to expect these landowners to pay for the damage caused by runoff from others.

Furthermore, because this watershed is the subject of national attention and may likely benefit from grant (or other potentially non-reimbursable) funds, this rule should also include a statement that the contribution from the permittee may be zero, in the case of stream restoration efforts supported financially by a third party or other funding source. This will ensure that the entire watershed community will benefit from moneys granted to restore the stream and may also encourage both individual and general permittees to work together to secure grant money or alternative funding mechanisms.

Response: *The MTA has concurred that restoration work is appropriate in instances where a stream has become impaired due to past discharges to the stream. The Department concurs that an operator should not have to contribute to stream restoration work if the operator's past discharge did not contribute in any way to the impairment and will propose an amendment to the draft rule to clarify this. This circumstance will likely only occur where the restoration work on the stream is upstream from where the applicant's discharge reaches the stream, or where the applicant's site was only recently developed. The Department also recognizes that demonstrating cause and effect from one particular site is nearly impossible to do in most cases, and therefore, if there is impaired stream channel or riparian area downstream of a designated discharge, the Department expects to require mitigation measures.*

Any grant money that is obtained for restoration work will most likely be administered through the Long Creek Watershed Management District. However, if an individual permittee were to obtain grant money for stream restoration, the Department would accept the use of those funds as a means for that entity to meet permit obligations.

Comment: III(A). Subsection b(1) Mitigation Measures

The MTA reads Subsection (b)(1) as requiring mitigation measures, other than the "officially accepted" Chapter 500 treatment BMPs, be implemented on a applicant's property when necessary to mitigate for past storm water runoff that has impacted the stream. We believe this section is an appropriate method for requiring an applicant to remedy damage already done and to mitigate future damage that Chapter 500 treatment is unable to prevent. We believe, however, that this section should be clarified so that the measures taken are confined to measures that address direct discharges from the applicant's land. For instance, while the stream channel on or adjacent to an applicant's property might require restoration measures such as stream stabilization, that degradation may be due as much or more to discharge from neighboring or upstream landowners as it is to runoff from the applicant's land. As written, the wording here could require an applicant to mitigate for stream degradation that had little (or even nothing) to do with the applicant's own runoff. While this might be acceptable under a General Permit, we do not believe it is appropriate for an Individual Permit. We believe this issue could be addressed through something similar to the following modifications to this subsection, which are provided to further illustrate the intent of our comment:

(1) On Site measures be taken to mitigate the direct and reasonably proportional effects of the past storm water direct discharges from applicant's property on the urban impaired stream, such as restoration of floodplain area, establishment of vegetated riparian buffers, and stabilization of the stream channel. Where the adverse effect to be mitigated is the result of discharges from the property of applicant in combination with discharges from other property, then the mitigation required will be in proportion to the estimated discharge from the applicant's property in relation to the amount of contributing discharge from other properties.

Response: *The Department concurs that mitigation measures required should be proportional to the estimated amount of impact from the operator's site versus that from other sites and will propose an amendment to the draft rule to clarify this. Mitigation measures may be more appropriate off-site than on-site, depending on where stream impacts occur. For this reason, contribution to a watershed management plan, if one exists, may be a more feasible way to provide mitigation.*

Comment: III(B). Subsection b(2) Financial Contributions

Subsection (b)(2) requires a financial contribution towards mitigation and restoration "off site" of an applicant's property. The MTA understands the rationale behind this requirement but believes the issues here are similar to the issues raised by (b)(1). There is nothing in this subsection to limit the required payment to projects that can reasonably be shown to have been required by runoff from applicant's property or to require that the amount of payment be proportional in any way to the damage caused. The suggestion that contributions be based on amount of impervious area only partially addresses this. For instance, under this provision, an applicant could be required to pay for riparian efforts which were entirely upstream of the applicant's property and therefore could not have resulted in any way from applicant's runoff. It's also possible, as written, that an

applicant's contribution might not go to riparian efforts at all.⁴ In short, while we appreciate the need for the DEP to be able to require some form of payment towards off site efforts in some cases, we believe this section is drafted too broadly. As written, this section could require an applicant that had gone to great expense to treat its own property to then nevertheless pay fees that were applied to projects totally unrelated to runoff from that individual applicant's land. Since there are no caps on the amount of contribution required, an applicant might even be required to pay *more* towards the mitigation of runoff from others than that applicant would have had to under a general permit.⁵ The following possible modifications to this subsection are provided to illustrate the intent of this comment:

(2) Where a Department-approved watershed management plan exists and is being implemented, the Department may require that a financial contribution, or a combination of a financial contribution and mitigation, be made toward restoration of floodplain area, establishment of vegetated riparian buffers, and stabilization of the stream channel, consistent with the approved watershed management plan, and reasonably proportional to the contributory effect of direct discharges from applicant's property to the degradation necessitating the project the contribution is made towards. Payments under this subsection shall be tied to a specific project identified in the watershed management plan and will be returned to applicant if that project is not constructed within the then current permit cycle. If appropriate, the financial contribution may be based on the percentage of impervious area in the watershed that is located on the applicant's property and directly discharges to the area to be restored, stabilized or otherwise rehabilitated multiplied by the estimated total cost for the identified project or projects. Payments may be spread over multiple years in accordance with a schedule approved by the Department.

Response: *The Department concurs that the contribution amount that an individual permittee should be assessed should be proportional to the amount of impact caused by the operator's past discharges, where this can be assessed, and that the mitigation be tied to a specific project or projects identified in the plan. Adding a requirement that paid contributions be returned if mitigation work is not completed in the permit cycle does not provide a solution for meeting the stream restoration requirement. The Department*

⁴ The proposed rule states that required contributions will be "consistent with the approved watershed management plan" but it does not state that the contributions will be directed towards any particular project. Further, even if the contributions are directed towards a project that may be identified in a plan and can be reasonably related to the effects of an individual applicant's runoff, there is no guarantee that the project will ever actually be built. A watershed management district has leeway to shift its priorities and budgeting dependent on level of funding, shown effectiveness of measures and other factors. There are many reasons why an identified riparian project, for instance, might not be built in which case an applicant's contribution could be used for any project, such as construction of BMPs on a general permittee's property, which would be totally unrelated to any effect of runoff from the individual applicant's land.

⁵ This is especially true since, as described below, the draft Individual Permit is not limited to "direct discharges" as the General Permit is

would, however, consider alternate restoration proposals from the permittee on a case by case basis.

Comment: III(C). Subsection (d) Additional Requirements

Subsection (d) states that the DEP may establish "additional requirements ... if necessary", without any limitation on what those requirements might be or when they might be imposed. The MTA believes that the completely unrestricted nature of this power is unfair to applicants who choose the Individual Permit route. In contrast to the General Permit, which by its nature extends indefinitely and will change over time, the Individual Permit should offer some degree of predictability. We believe that after spending the initial substantial amount of time and money to comply with Chapter 500, then committing to the projects identified both on site and off site under subsections (b)(1) and (b)(2), an individual permittee should be entitled to some degree of security in its permit and not be required, years later, to submit to unexpected and probably expensive projects.

Response: *The authority to require additional requirements stems from the Department's delegated authority under the Clean Water Act to require permits for discharges that cause or contribute to an impaired water. While the Department expects the collective level of treatment from operators complying with either the general permit or an individual permit will be sufficient to restore an impaired water to water quality standards, the outcome will not be known for sure until work is carried out. Sub-section (d) states the Department's existing authority to require additional measures if necessary in the future in the event that current proposed measures are not sufficient. If necessary, this would happen at a time of re-licensing.*

Comment: IV. Relation of Restoration / Mitigation Requirements to Chapter 500 Treatment

The MTA believes that the provisions in part (b-d) reinforce the argument made in Sections II and III of this Comment that the 75% treatment and MOA standard should be retained. The mechanisms in parts b-d of the proposed rule provide a method, unavailable in the normal Chapter 500 process, for the DEP to require a landowner to compensate, not only for past discharges of storm water, but for storm water it is unable to treat. The DEP recognizes, for instance, under subsection 9(c) of the proposed rule, that 100% treatment is not necessarily a prerequisite for the ultimate goal of restoration of a stream. The MTA believes that the draft subsections b and d provide a framework whereby a limited access highway like the MTA could commit to projects that, while not strictly meeting the definition of Chapter 500 BMPs, nevertheless, through mitigation and restoration, could provide an equivalent or even greater benefit to restoration of an impaired stream than 100% treatment through Chapter 500 BMPS could do.⁶ While we believe these provisions should be more strictly defined, we do agree that the flexibility they give the DEP is in general a good thing both for the stream and permittees.

⁶ Furthermore, we believe this kind of flexible framework is completely in line with the legislative intention behind development of the storm water MOA process and would be consistent with the way transportation agencies and the DEP have always addressed storm water issues.

Response: *Every operator has an obligation to ensure that his/her own discharge is not causing or contributing to the impairment of a classified body of water. The Department recognizes that in some instances it may not be technically feasible for an operator to provide for on-site treatment of stormwater, and will propose an allowance for off-site treatment in the same watershed for those circumstances. The Department does not find that retaining the reduced (75%) treatment standard for roads or the provisions of the MOA as sufficient for ensuring that private and public sector entities are being treated equitably.*

Comment: V. Note on Discharge and Direct Discharge

In this draft rule, "discharge" and "impervious area" are used without modification. Under the General Permit, only "direct" discharges as defined by the DEP are regulated, and only impervious area that contributes such "direct discharge" is counted towards a permittee's regulated area. The MTA believes, from its understanding of DEP staff comments at the time, that the General Permit was set up this way because the Clean Water Act only allowed regulation of discharges that were deemed to be "direct." Whether or not this is so, we believe that the Individual and General Permits should use the same standard and only areas that "directly" discharge to an urban impaired stream should be regulated by this rule.

Response: *The proposed rule will apply to operators that have received notice that their stormwater discharge has been designated by either the U.S. Environmental Protection Agency or the Maine Department of Environmental Protection as requiring a permit. MTA is correct that only direct discharges, which are considered to be point sources, will be included under designation. The rule will not establish new limitations on what needs a permit, but will establish the standards for obtaining an individual permit.*

Comment: VI. Note on Fiscal Impact

The MaineDEP Rule-making Fact Sheet, implies that fiscal impacts for this rule are not anticipated to exceed \$1M since this portion has been left blank. However, Maine DEP estimates the costs for meeting the individual permit requirements are \$30,000 to \$50,000 per acre of impervious cover (IC). In the Long Creek watershed alone, according to the Long Creek Watershed Management Plan, there are at least 630 acres of IC. Therefore, even if only 10% of the IC acreage were to seek coverage under the Individual Permit, fiscal impacts for this area would easily exceed \$1M (e.g., costs would be \$1.89M to \$3.15M based on MaineDEP estimate information). This represents a significant increase to the cost of doing business in this area. Furthermore, explanation of the aggregate fiscal impact has been neglected not only for Long Creek, but also urban impaired stream watersheds throughout the State.

In fact, the proposed rule imposes a fiscal impact of close to \$1M just on the MTA property alone in Long Creek, as demonstrated in the example below:

- MTA holdings in Long Creek watershed include approximately 32 acres of Impervious Cover (IC), of which roughly 25 acres are considered "direct discharges."

- Assuming that only “direct discharges” will require individual permit coverage⁷, MaineDEP’s estimate of \$30,000 to \$50,000 per acre of IC will result in MTA paying between \$750K and \$1.25M over a five year period to meet individual permit requirements. (However, if the individual permit is not limited to “direct discharges” then MTA’s anticipated costs over the 5-year permit jump to \$960K to \$1.6M.)
- It is our understanding that this estimate (e.g., \$30K to \$50K per acre of IC) was established long before the Maine DEP proposed the additional costs for stream restoration, off-site mitigation and other “additional requirements.” Therefore, the costs proposed under this rule could be significantly higher.

If the fiscal impact for MTA alone to comply with this proposed rule verges on \$1M in the Long Creek watershed, what are the overall and aggregate fiscal impacts for other public and private landowners in watersheds throughout the State of Maine? This rule may be especially onerous to landowners that may not be able to choose the general permit option.⁸

The MTA also wants to point out that the proposed rule's fiscal note does not describe the impact as it specifically relates to municipalities and counties as required by 5 MRSA 8063.

Response: *The designation under authority of the Federal Clean Water Act of stormwater discharges that flow to an impaired water resource establishes a requirement for an operator of a designated discharge to obtain a permit. The Department, as permitting authority, must make a finding that the discharge will not cause or contribute to the water quality impairment. Whether or not the proposed rule is adopted, operators must be able to demonstrate that their discharge will meet this requirement. While the Department views the fiscal impact as stemming from the Federal law, we agree that the proposed standards do quantify what the costs will be for an operator who requests an individual permit. The costs on a per acre basis have been included in the Fact Sheet issued with the draft rule. To go beyond these costs is of questionable value in that there is a high level of uncertainty as to how many operators would seek an individual permit, especially with a less expensive general permit option available. The Department expects that the only operators who request individual permits will be ones that had already expended most of the costs because they needed to comply with the Maine Stormwater Law requirements. In these cases, the added cost to the operator as a result*

⁷ Please see the discussion under Section V above

⁸ It is important to note that there may be instances where a landowner may not be allowed to choose the general permit option. For example, the current draft of the Participating Landowners Agreement for the Long Creek watershed that must be executed between the landowner and the Long Creek Watershed Management District excludes landowners from participating (e.g., choosing the general permit option) when they are not able to grant an easement on their property to allow a project identified in the Long Creek Watershed Management Plan to be constructed and/or accessed thus leaving these landowners no choice but to choose the more costly individual permit option.

of this rule would be much less than the \$30,000 to \$50,000 per acre estimated in the Long Creek Watershed Management Plan. While MTA indicates its own cost could exceed \$1 million dollars over a 5-year period, if it elects to file for an individual permit, it is highly uncertain that the agency would choose an individual permit over a general permit that would be less costly to comply with.

Although there are currently 31 urban impaired streams, only 1 has been designated as requiring permits to date. It is unknown how many more designations will take place, so again the assignment of estimated costs is highly speculative and of questionable value. Nonetheless, the Department will amend the fact sheet to provide recognition that costs arising from the federal requirements of the Clean Water Act do result in added costs and that these costs will exceed \$1 million dollars, whether through the general permit or the individual permit.

Comment: VII. Routine Technical or Major Substantive

The MTA asks the DEP staff and Board to reconsider whether it is appropriate to treat this proposed rule as a "routine technical rule." The proposed rule cites 38 MRSA 413 as an authority and we are aware that rule amendments under that section are described as "routine technical" unless the rule being amended was originally major substantive.⁹ However, we ask that the board consider whether Section 413 is the appropriate section and whether this rule is consistent with the type of rules that the legislature anticipated when it classified rules under Section 413 as routine technical. Whether or not there is a legal basis for treating this rule as routine technical we ask the board to consider whether it is appropriate and consistent with legislative intent to treat as routine technical a rule that meets practically every one of the tests for a major substantive rule under Maine law.

In 5 MRSA 8071, "Major Substantive Rules" are defined as rules that may *in the judgment of the Legislature*:

- *require the exercise of significant agency discretion or interpretation in drafting; or*
- *due to the subject matter or anticipated impact, are reasonably expected to result in a significant increase in the cost of doing business, a significant reduction in property values, the loss or significant reduction of government benefits or services, the imposition of state mandates on units of local government as defined in the Constitution of Maine, Article IX, Section 21, or other serious burdens on the public or units of local government.*

We believe this rule meets every one of these tests, except for "the loss or significant reduction of government benefits test."¹⁰ We also believe that this draft rule, because of its provisions for payment to monitoring programs and/or an approved watershed

⁹ We're not aware how the original Chapter 521 was classified or if it was classified at all.

¹⁰ We believe, without doing significant research on the question, that this includes the "state mandate" test. We do not know what the legal or constitutional implications of this rule qualifying as a "state mandate" in the constitutional sense would be - however, we believe that the DEP staff and Board should carefully consider the question.

management plan, meets the other standard included in Section 8071: *"The establishment or amendment of an agency fee by rulemaking is a major substantive rule, except for the establishment or amendment of a fee that falls under a cap or within a range set in statute, which is a routine technical rule."*

The DEP may well have the legal authority to treat this as a routine technical rule - the intention of this comment is not to argue that point. However, we do urge the DEP staff and Board to consider whether that is in fact the case and to further consider, given the nature and significant impact of this rule, whether it might be sound public policy to move forward with this rule under the major substantive rulemaking process.

Response: *The Department has an obligation under the federal Clean Water Act to require permits of operators with a designated discharge and must be able to make a finding that the discharge does not cause or contribute to the water quality impairment. An applicant for an individual permit will likely face considerable expense to meet this requirement regardless of whether the proposed amendments to Chapter 521 are adopted or not. The authority for this rule is 38 M.R.S.A. § 341(1-B). Chapter 521 has not been designated as a major substantive rule. While the rule provides that a licensee is required to either monitor its on-site storm water discharges or contribute to a Department-approved monitoring program, and while the Department may require a licensee to mitigate the effect of its past storm water discharges by undertaking stream restoration or making contributions to a Department-approved watershed management plan (or some combination of the two), these provisions do not establish an agency fee within the meaning of 5 M.R.S.A. § 8071. The Department is not seeking a change in its status for this rule-making.*

Comments from the Maine Department of Transportation (MaineDOT)

Comment: The Maine Department of Transportation (MaineDOT) concurs with comments on the DEP's proposed Chapter 521 submitted to the Board of Environmental Protection by the Maine Turnpike Authority (MTA), dated January 11, 2010. MaineDOT owns **62 acres of impervious surfaces** in watershed, comprising 9.5 miles of roads, all within Urban Compact operated by municipalities of South Portland, Portland, Westbrook and Scarborough. Using data from the Long Creek Watershed Management Plan (the Plan), a conservative estimate for treatment is \$138,000/acre. For all MaineDOT impervious surfaces the total would be **\$8,320,000**. Because remedial activities described in the Plan are currently considered as maintenance activities by the Federal Highway Administration, this expense is not eligible for federal funding and therefore would be an additional draw on Maine's State Highway Fund. Conversely, the Long Creek Watershed District has, through estimating the percent landowner participation, calculated an initial annual assessment fee of approximately \$3,000 per acre, resulting in a MaineDOT annual "fee" of **\$186,000 per year or \$1.86 million dollars over the 10 year life** of the Plan. Assuming all else being equal, it is becoming increasingly apparent that the General Permit is likely to prove the less expensive option for Maine taxpayers.

Because it would not be feasible for the State of Maine to meet the proposed Chapter 521 standards for public roads it maintains in the Long Creek Watershed, MaineDOT anticipates opting to participate in the General Permit for this watershed as the only alternative available to the Individual Permit process. DEP has thus far worked collaboratively with MaineDOT and

other stakeholders to resolve many concerns expressed during development of the Plan and the associated Participating Landowner Agreement. However there are several unresolved issues at hand regarding the enactment of the NPDES Residual Designation Authority (RDA) permit for the Long Creek Watershed. The overarching concern is to assure that linear projects or portions of projects continue to be acknowledged as having unique challenges in stormwater management, particularly where retrofits are concerned. The current status of state transportation funding, the consequences to state agencies, and limitations on how state and local authorities interact are fiscal and statutory realities to be addressed. Also, the long term consequences if this RDA permit is extended to the other Urban Impaired Streams in the state. Outstanding concerns are described below.

Response: *See Response to MTA's Introduction comments.*

Comment:

1. To apply the RDA on a broad scale would have a tremendous impact on existing development including state and local transportation systems. There are currently 31 Urban Impaired Streams in Maine. From a rough analysis of GIS data, MaineDOT maintains an estimated 550 acres of public roads in the UIS watersheds. Anticipating that the Long Creek Plan is intended as a model for future watershed management plans such that UIS across the state would have requirements identical or similar to those in the Long Creek Individual Permit, the total cost to taxpayers for MaineDOT property alone will easily exceed **\$50 million dollars** in state funds.

Response: *The Department acknowledges that stream restoration is expensive. We have made grant money available and are currently working with several communities to develop watershed plans for restoring water quality in their urban impaired streams. We hope that designation of stormwater discharges can be avoided for the vast majority of those waters due to voluntary measures. This does not eliminate costs for landowners and operators with stormwater discharges, but does remove the permit requirement.*

Comment:

2. As of June 2009 MaineDOT has been on the record at a Long Creek Watershed Plan Steering Committee meeting stating that pursuant to state law MaineDOT cannot be subject to the regulatory authority of municipalities and therefore could not pay a "Utility Fee". But in an effort to be a Participating Landowner in the implementation of the Plan, MaineDOT expects to contribute the state's share whatever regulatory vehicle is established through construction of the priority retrofits that are within MaineDOT rights-of-way, provide technical assistance to the Long Creek Watershed District, and work with the municipalities for additional maintenance activities (non-structural BMPs) identified in the Plan. Though the Participating Landowners Agreement was modified in response to this concern, logistics of this payment scenario remain unclear.

Response: *The Department has been supportive of provisions in the Long Creek Participating Landowner Agreement that allow MaineDOT and MTA to provide services in lieu of payment to the Long Creek Watershed Management District.*

Comment:

3. Linear projects with limited rights-of-way, such as public roads, present unique stormwater management challenges. The unique nature of these types of structures has been acknowledged by Maine DEP and the Board over the last decade through the implementation of a Memorandum of Agreement between Maine DEP, MaineDOT and MTA for stormwater management pursuant to Chapters 500 and 502 and through the recent development of a specialized MS4 permit for state transportation infrastructure. Based on this precedent, in August 2009 MaineDOT and MTA drafted a tentative outline for an alternative general permit for state transportation infrastructure, the development of which is enabled in the (Clean Water Act) Residual Designation Authority. During a subsequent meeting with Don Witherill, Director of DEP's Division of Watershed Management, to review concerns and discuss an alternative permit, MaineDOT and MTA agreed to attempt to address concerns in the PLA at DEP's request to support the ongoing Plan and PLA process to the most reasonable extent.

Despite the collaborative efforts of DEP to date, MaineDOT and MTA remain concerned about the potential impossibility to comply with and fund remediation measures specified in 31 different, watershed-specific plans administered by 31 different watershed districts. Given that the state's transportation infrastructure is managed consistently on a state-wide basis, a fact recognized by past precedent in stormwater agreements and permits, we respectfully request that DEP continue to work with MaineDOT and MTA to create an alternate general permit for public transportation systems by January 2011. With a good faith agreement in place to work toward implementing an alternate general permit for linear transportation facilities and in the interim, MaineDOT will participate in the General Permit for the Long Creek Watershed.

Response: *Department staff is willing to further explore ideas with MaineDOT and MTA on a possible alternate permit process that meets those agencies needs for addressing highway related concerns in urban impaired stream watersheds throughout the State, while maintaining an equitable level of effort with that being required of private landowners.*